[slip op. 1]

SJC-06684

Elizabeth G. CURTIS & others[1]

vs.

SCHOOL COMMITTEE OF FALMOUTH & others.[2]

Barnstable. March 7, 1995. - July 17, 1995.

Present: Liacos, C.J., Wilkins, Abrams, O'Connor, & Greaney, JJ.

Practice, Civil, Summary judgment. Education, Role of courts. School and School Committee, Condom-availability program. Constitutional Law, Education, Privacy, Parent and child, State action, Freedom of religion. Privacy. Parent and Child, Interference with parental rights. Religion.

Civil action commenced in the Superior Court Department on May 22, 1992.

The case was heard by Gerald F. O'Neill, Jr., J., on a motion for summary judgment.

---

1. Carol Curtis, Kristen Jenkinson, Eileen F. McDevitt, Daniel MacLone, Nancy MacLone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer, Beverly Peltzer, and Edward Peltzer.

2. The superintendent of the Falmouth public schools, the principal of Falmouth High School, and the principal of the Lawrence Junior High School. The principals were sued in their official and individual capacities.

The Supreme Judicial Court granted an application for direct appellate review.

Larry L. Crain, of Tennessee (Joseph C. Paruti, with him) for plaintiffs.

Edward T. Hinchey, (Robert G. Eaton with him) for defendants.

Catherine Weiss, of New York, & Sarah Wunsch, for American Civil Liberties Union & others, amici curiae, submitted a brief.

Scott Harshbarger, Atty. Gen., & Amy Spector, Asst. Atty. Gen., for Com., amicus curiae, submitted a brief.

[slip op. 2]

A. Van C. Lanckton, Darren R. Klein & Nancy Weissman, for American Jewish Congress & another, amici curiae, submitted a brief.

LIACOS, C.J. The plaintiffs, students and parents of students in the Falmouth public school system, appealed from a grant of summary judgment in favor of the defendants, the school committee of Falmouth (school committee) and three individual defendants. We granted the school committee's application for direct appellate review. We affirm.

This case involves a program of condom availability established by the defendants in the junior and senior high schools of Falmouth. The plaintiffs brought this action against the defendants in response to the implementation of the program. They requested declaratory and injunctive relief under 42 U.S.C. § 1983 (1988), and G.L. c. 12, § 11I (1994 ed.), in the Superior Court, alleging violations of the their

Federal constitutional rights. A judge in the Superior Court denied relief and granted the defendants' motion for summary judgment.[3]

[slip op. 3]

The plaintiffs alleged in their amended complaint, and now argue before this court, that the condom-availability program, as it stands, violates their right to familial privacy and their guaranteed liberties as parents in the control of the education and upbringing of their children, protected by the Fourteenth Amendment to the United States Constitution. They also argue that the program violates their right to free exercise of religion guaranteed by the First Amendment to the United States Constitution, art. 46, § 1, of the Amendments to the Massachusetts Constitution, and art. 2 of the Declaration of Rights of the Massachusetts Constitution[4]. The plaintiffs ask

---

3. In addition to his denial of the plaintiffs' claims, the motion judge granted summary judgment in favor of the defendants on their request for declaratory judgments, to establish that the defendants' conduct violated G.L. c. 274, § 3 (1994 ed.), and G.L. c. 265, § 23 (1994 ed.), by functioning as accomplices to statutory rape of or by the students, G.L. c. 119, § 51A (1994 ed.), by failing to report sexual abuse of students reasonably expected to occur based on students' use of condoms, and G.L. c. 71, § 30 (1994 ed.), the moral education statute. The plaintiffs do not argue these statutory claims on appeal and hence these claims are waived. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Instead, their argument focuses on their constitutional claims as discussed in the text of this opinion.

4. Since the plaintiffs did not put their State constitutional claims before the judge in the Superior Court, we decline to consider them on appeal. See Albert v. Municipal Court of the City of Boston, 388 Mass. 491, 493-494 (1983), and cases cited. See also Tate,

us to reverse the judge's entry of summary judgment for the defendants and to enjoin the school committee from continuing to make condoms available to students without the inclusion of a provision which would permit parents to opt out of the program and without a system of parental notification of their child's requests for a condom.

The motion judge set forth the facts as follows: "On January 2, 1992, following an authorizing vote of the FSC [Falmouth school committee], the Superintendent of Schools issued a memorandum to the teaching staff of grades 7 through 12, detailing the condom availability program. At Lawrence Junior High School, students could request free condoms from the school

[slip op. 4]

nurse. Prior to receiving them, students would be counseled. The nurse was also instructed to give students pamphlets on AIDS/HIV and other sexually transmitted diseases. At Falmouth High School, students could request free condoms from the school nurse, or students could purchase them for $.75 from the condom vending machines located in the lower level boys' and girls' restrooms. Counseling by trained faculty members would be provided to students who requested it, and informational pamphlets were available in the [school] nurse's office. The Superintendent's memorandum instructed the staff to reserve their own opinions regarding condom availability in order to respect students' privacy. The memorandum also indicates that the Superintendent's presentation of the condom availability to the student body would stress abstinence as the only certain method for avoiding sexually transmitted diseases. The condom availability program took effect on January 2, 1992.

---

petitioner, 417 Mass. 226, 230 (1994).

"The FSC condom program does not provide for an 'opt out' for students' parents whereby the parents have the option of excluding their student child from the availability of condoms. Nor is there a parental notification provision in the FSC program by which parents would be notified of their children's requests for condoms.

"Because no high school currently exists in the town of Mashpee, Mashpee residents attend Falmouth High School pursuant to a five-year contract between the Mashpee and Falmouth school committees. The contract does not provide for Mashpee residents

[slip op. 5]

to vote in the elections of FSC members. The contract does not prohibit the Mashpee School Committee (MSC) from entering into a similar contract with other neighboring schools or school committees. On September 20, 1992, the MSC voted 4-1 to object to the FSC condom availability program. Pursuant to the contract between the FSC and the MSC, this vote was not binding on the FSC." (Footnote omitted.)

The judge concluded that the plaintiffs had failed to meet the threshold requirement for each of their claims because they were unable to demonstrate that the condom-availability program placed a coercive burden on their rights. The plaintiffs argue that they were not required to show coercion in order to survive the summary judgment motion. They further argue that, even if coercion is the proper standard, the program meets that standard. Thus, they argue, the State was required to prove the existence of a compelling State interest in maintaining the condom-availability program.

As we shall discuss in more detail below, the condom-availability program in Falmouth is in all respects

voluntary and in no way intrudes into the realm of constitutionally protected rights. Because no threshold demonstration of a coercive burden has been made, nor could have been made on these facts, the defendants properly were granted summary judgment.[5]

[slip op. 6]

In reviewing a grant of summary judgment, we examine whether all material facts have been established and whether the moving party is entitled to judgment as matter of law. We view the evidence in the light most favorable to the nonmoving party. Mass.R.Civ.P. 56(c), 365 Mass. 824 (1974). See Judson v. Essex Agric. & Technical Inst., 418 Mass. 159, 162 (1994); McDonough v. Marr Scaffolding Co., 412 Mass. 636, 638 (1992). "[A] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Judson v. Essex Agric. & Technical Inst., supra, quoting Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

The plaintiffs dispute the judge's conclusion that there were no material facts at issue. They point to affidavits filed with the court which allegedly contravene the defendants' underlying rationale for implementing the program. These affidavits contain expert opinions on the possible negative repercussions of making condoms available to young people. An argument could be made that these expert opinions might

---

5. There is no need for further inquiry into the State's interest since we conclude the judge properly found no constitutional infringement.

be relevant to a determination of the State's interest in implementing the program against the plaintiffs' interest in their constitutionally protected rights. However, the judge found no infringement of the plaintiffs' rights and, thus, did

[slip op. 7]

not reach the stage of constitutional analysis which would have required him to examine the extent of the State's interest. Doe v. Irwin, 615 F.2d 1162, 1169 (6th Cir.), cert. denied, 449 U.S. 829 (1980). These affidavits involve considerations "not germane to the narrow constitutional issue presented." Zorach v. Clauson, 343 U.S. 306, 310 (1952). The issues before the judge were issues of law, i.e., whether the condom-availability program, the provisions of which are not in dispute, infringes on the rights of the plaintiffs to familial privacy, parental liberty, and free exercise of religion. We conclude that the judge properly decided the case on a motion for summary judgment. Attorney Gen. v. Bailey, 386 Mass. 367, 374, cert. denied sub nom. Bailey v. Bellotti, 459 U.S. 970 (1982). We turn now to a review of the judge's determination of the issues. See McNulty v. McDowell, 415 Mass. 369, 370 (1993), and cases cited.

We begin our discussion by defining the role of the courts with respect to the administration of public education. Public education of children is unquestionably entrusted to the control, management, and discretion of State and local school committees. Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.), cert. denied, 474 U.S. 826 (1985). See G.L. c. 72, § 37, wherein the Legislature explicitly delegates this authority to local school committees.

"Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems

[slip op. 8]

and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, supra. Furthermore, courts must take caution before they order changes in educational programs adopted by duly chosen local authorities[6]. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir.1987), cert. denied, 484 U.S. 1066 (1988). Obviously, "a State's interest in universal education ... is not totally free from a balancing process when it impinges on fundamental rights and interests...." Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Yet, in the absence of a direct and sharp implication of basic constitutional values, this dispute is not an issue for the courts. See Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988); Wisconsin v. Yoder, supra at 234-235.

1. Parental liberty and familial privacy claim. The plaintiffs argue that the condom-availability program violates their substantive due process rights, protected by the Fourteenth Amendment, to direct and control the education and the upbringing of their children. In the same vein, they argue that the program invades the constitutionally protected "zone of privacy" which surrounds the family. Further, they claim the program intrudes on these rights because it allows their minor children unrestricted access to contraceptives without parental input and

[slip op. 9]

within the compulsory setting of the public schools. They

---

6. Here, the program was implemented after numerous town meetings and school committee meetings, culminating in a final vote of the school committee in favor of the program. The plaintiffs do not take issue with the validity of the political process by which the condom-availability program was approved.

claim that in these circumstances parents have the right to intervene and prohibit their children from obtaining the condoms (by an opt-out provision in the program), and that they have a right to parental notification if their child requests and obtains a condom.

We agree that parents possess a fundamental liberty interest, protected by the Fourteenth Amendment, to be free from unnecessary governmental intrusion in the rearing of their children. See Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Wisconsin v. Yoder, supra at 232-233; Prince v. Massachusetts, 321 U.S. 158, 166-167 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923). We recognize that, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Society of Sisters, supra at 535. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and the upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, supra at 232. See Ginsberg v. New York, 390 U.S. 629, 639 (1968). Aspects of child rearing protected from unnecessary intrusion by the government include the inculcation of moral standards, religious beliefs, and elements

[slip op. 10]

of good citizenship. Wisconsin v. Yoder, supra at 233. See Meyer v. Nebraska, supra; Pierce v. Society of Sisters, supra. Thus, for example, in Meyer v. Nebraska, the Court held that the State could not prohibit the teaching of languages other than English in the public school. Similarly, in Pierce v. Society of Sisters, supra, the Court held that the State could not

pass a law requiring that all students attend public school, rather than private or parochial schools[7]. The Court has held, on substantially the same reasoning, that government may not intrude unnecessarily on familial privacy. Prince v. Massachusetts, supra. See Moore v. Cleveland, 431 U.S. 494, 499 (1977).[8]

While it is clear that the plaintiff parents possess these protected interests, they have failed to demonstrate how the interests are burdened by the condom-availability program to an extent which would constitute an unconstitutional interference by the State. This is the threshold requirement in the analysis of these constitutional claims. Without it, we need not inquire

[slip op. 11]

into the State's interest in implementing the program. Doe v. Irwin, 615 F.2d 1162, 1168 (6th Cir.1980).

The type of interference necessary to support a claim based on an alleged violation of parental liberty appears to be that

---

7. Each of these laws might have been upheld, however, had the State been able to show a compelling interest requiring State action. For example, in Prince v. Massachusetts, 321 U.S. 158 (1944), the Court held that the State's interest in protecting children by laws prohibiting child labor overcame a parent's interest in directing the religious development of her child. Id. at 166-167.

8. Massachusetts caselaw has endorsed these principles. See, e.g., Matter of McCauley, 409 Mass. 134, 136-137 (1991); Care & Protection of Charles, 399 Mass. 324, 333-334 (1987); Custody of Two Minors, 396 Mass. 610, 617 (1986); Commonwealth v. Stowell, 389 Mass. 171, 173 (1983); Richards v. Forrest, 278 Mass. 547, 553 (1932).

which causes a coercive or compulsory effect on the claimants' rights. The plaintiffs claim, however, that they were only required to show an infringement of their rights, and not necessarily a coercive one. While courts apparently have not explicitly stated that "coercion" is the standard, they have not proceeded further in the constitutional analysis unless the governmental action has had a coercive effect on the claimants' parental liberties. See Doe v. Irwin, supra at 1168. See also Wisconsin v. Yoder, supra (compulsory school attendance law violated, inter alia, Amish parents' right to direct religious upbringing of children); Pierce v. Society of Sisters, supra (law requiring public school attendance and prohibiting attendance at private parochial schools violated parental liberties); Meyer v. Nebraska, supra (law prohibiting teaching of foreign languages to school children violated parental liberties). These cases strongly imply that, in order to constitute a constitutional violation, the State action at issue must be coercive or compulsory in nature. Coercion exists where the governmental action is mandatory and provides no outlet for the parents, such as where refusal to participate in a program results in a sanction or in expulsion. See, e.g., Wisconsin v. Yoder, supra;

[slip op. 12]

Meyer v. Nebraska, supra at 399-401; Pierce v. Society of Sisters, supra; Doe v. Irwin, supra.

We discern no coercive burden on the plaintiffs' parental liberties in this case. No classroom participation is required of students. Condoms are available to students who request them and, in the high school, may be obtained from vending machines. The students are not required to seek out and accept the condoms, read the literature accompanying them, or participate in counseling regarding their use. In other words, the students are free to decline to participate in the program. No penalty or disciplinary action ensues if a student does not

participate in the program. For their part, the plaintiff parents are free to instruct their children not to participate. The program does not supplant the parents' role as advisor in the moral and religious development of their children. See Doe v. Irwin, supra at 1168. Although exposure to condom vending machines and to the program itself may offend the moral and religious sensibilities of the plaintiffs, mere exposure to programs offered at school does not amount to unconstitutional interference with parental liberties without the existence of some compulsory aspect to the program. See Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.App.3d 1, 30-31 (1975), appeal dismissed, 425 U.S. 908 (1976); Medeiros v. Kiyosaki, 52 Haw. 436, 438-439 (1970).[9]

---

9. The plaintiffs argue that Planned Parenthood of Southeastern Pa. v. Casey, 112 S.Ct. 2791 (1992), as well as Ohio v. Akron Center for Reproductive Health, 497 U.S. 502

[slip op. 13]

(1990), and Hodgson v. Minnesota, 497 U.S. 417 (1990), demonstrate a protected interest in preserving the parent-child bond in decisions regarding whether to bear children. In those cases the Court upheld a State requirement that minors obtain parental consent before having an abortion. The plaintiffs argue that, if parental notification is required for abortion, then that same requirement should naturally apply to support a right of parental input before the act of sexual intercourse occurs.

The two situations are hardly comparable: abortion involves a medical procedure, while obtaining a condom does not. While these cases reaffirm the Court's respect for the parent-child bond and encouragement of parent-child communication, these cases place the privacy interests of minors in a position superior to parental liberties. In each of the cases, the Court upheld the parental consent requirement only because the law in issue also provided an

[slip op. 13]

The plaintiffs argue that the condom-availability program is coercive because, although participation is voluntary, the program has been implemented in the compulsory setting of the public schools. See G.L. c. 76, § 1 (1994 ed.). In this connection, they rely on an opinion of a divided lower court (three-to-two decision), Alfonso v. Fernandez, 195 A.D.2d 46 (N.Y.1993), which struck down a similar program in New York public schools as a violation of the parents' right to direct the upbringing of their children. The New York court based its decision, in part, on the fact that State law required the parents to send their children to school in combination with the fact that the program did not include an opt-out provision for parents whereby they could prohibit their children from obtaining condoms. While the case may be read as supporting the plaintiffs' position, we disagree with its reasoning. Moreover, we point out that the decision was based more directly on a State

[slip op. 14]

law which required parental consent for medical treatment. The court concluded, erroneously we think, that the distribution of condoms constituted a medical service for which parental consent was required. See Alfonso v. Fernandez, supra at 61-65 (Eiber, J., dissenting).

With regard to the discussion in the case on compulsory attendance, we agree with the view expressed by the dissent that "the mere fact that parents are required to send their children to school does not vest the condom ... program with the aura of 'compulsion' necessary to make out a viable claim

---

alternative to parental consent. Minors may receive abortions under these laws without parental consent if consent is granted by a court.

of deprivation of a fundamental constitutional right. Unlike Meyer v. Nebraska, ... where a state attempted to totally prohibit parents from permitting their children to study a foreign language until after completion of the eighth grade, or Pierce, ... where a state attempted to prohibit parents from sending their children to private parochial schools, the element of compulsion is totally absent here." Id. at 67. We agree further that "the fact that students are in closer proximity to a potential source of contraceptive devices does not change the fundamentally voluntary nature of the program.... [N]othing compels the petitioners' children to participate in the program." Id. at 68. Because we conclude the program lacks any degree of coercion or compulsion in violation of the plaintiffs' parental liberties, or their familial privacy, we conclude also that neither an opt-out provision nor parental notification is required by the Federal Constitution. With the exception of the Alfonso case, it

[slip op. 15]

appears that cases requiring an opt-out or "excusal system" have involved school programs which would otherwise be compulsory. See, e.g., Citizens for Parental Rights v. San Mateo County Bd. of Educ., supra at 32; Medeiros v. Kiyosaki, supra at 440-441. Such is not the case here.

2. First Amendment free exercise claim. Next, the plaintiffs argue that the condom-availability program violates their Federal constitutional rights to the free exercise of religion. Religious freedom is guaranteed by the free exercise clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."[10]

---

10. The First Amendment applies to the States through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296

The preliminary inquiry in a free exercise analysis is whether the challenged governmental action creates a burden on the exercise of a plaintiff's religion. United States v. Lee, 455 U.S. 252, 256-257 (1982). See United States v. Means, 858 F.2d 404, 406 (8th Cir.1988), cert. denied, 492 U.S. 910

[slip op. 16]

(1989). Only if a burden is established must the analysis move to the next step: a consideration of the nature of the burden, the significance of the governmental interest at stake, and the degree to which that interest would be impaired by an accommodation of the religious practice. United States v. Means, supra. The degree of interference with free exercise necessary to trigger further analysis of the State's justification for the action in question, must at least rise to the level of a "substantial burden." Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989). The Supreme Court has indicated that, just as in the context of a parental liberties claim, a "substantial burden" is one that is coercive or compulsory in nature. See Lyng v. Northwest Indian Cemetery Protective

---

(1940). In Attorney Gen. v. Desilets, 418 Mass. 316, 320-321 (1994), we determined that claims based on art. 46, § 1, are to be analyzed under the Supreme Court's First Amendment jurisprudence as it existed prior to the recent decision in Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990), which altered the Supreme Court's First Amendment analysis only as to the degree of State interest required to overcome laws which substantially, but indirectly, burden religious conduct. See Salvation Army v. Department of Community Affairs of N.J., 919 F.2d 183, 194 (3d Cir.1990). In the view we take of the instant case, the holding of Smith is not relevant to our decision, nor does the Religious Freedom Restoration Act of 1993 (42 U.S.C. §§ 2000bb et seq.) seeking to reinstate the earlier Federal standard of Wisconsin v. Yoder, 406 U.S. 205 (1972), add anything to the plaintiffs' case.

Ass'n, 485 U.S. 439, 447-451 (1988); School Dist. of Abington v. Schempp, 374 U.S. 203, 222-223 (1963). See also Bowen v. Roy, 476 U.S. 693, 704-705 (1986); Smith v. Board of Educ., N. Babylon Union Free Sch. Dist., 844 F.2d 90, 92-93 (2d Cir.1988); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir.1987); Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir.1985). The free exercise clause "categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such," either directly or indirectly. McDaniel v. Paty, 435 U.S. 618, 626 (1978). Wilson v. Block, 708 F.2d 735 (D.C.Cir.), cert. denied, 464 U.S. 956 (1983), and cert. denied sub nom. Hopi Indian Tribe v. Block, 464

[slip op. 17]

U.S. 1056 (1984)[11]. In our view the plaintiffs are unable to demonstrate sufficient facts to support their argument that the condom policy substantially burdens their rights to freely exercise their religion to any degree approaching constitutional dimensions.

The plaintiffs argue that the condom-availability program burdens their right freely to exercise their religion by creating a conflict between the religious teaching of parents as to the issue of premarital sexual intercourse, and the view, allegedly endorsed by the school committee, that sexual activity before

---

11. Massachusetts cases addressing the issue of religious freedom under both the State and the Federal Constitutions have generally also inquired, as a preliminary matter, whether the State action creates a substantial burden on a claimant's free exercise of religion. Attorney Gen. v. Desilets, supra at 322. Fedele v. School Comm. of Westwood, 412 Mass. 110, 116 (1992), quoting Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989).

marriage is not only permissible but also can be made safe. The plaintiffs contend further, as noted in the previous section, that the program is coercive in nature, because it exists in the public schools, to which parents are compelled to send their children, and because it lacks an opt-out provision by which parents could choose to prohibit their children from obtaining condoms at school. The plaintiffs also argue that peer pressure may add to the coercive effect of the program.

Although all citizens have a right freely to exercise their religion, the free exercise clause "cannot be understood to require the Government to conduct its own internal affairs in

[slip op. 18]

ways that comport with the religious beliefs of particular citizens.... The Free Exercise Clause affords an individual protection from certain forms of compulsion...." Lyng v. Northwest Indian Cemetery Protective Ass'n, supra at 448, quoting Bowen v. Roy, 476 U.S. 693, 699-700 (1986). See School Dist. of Abington v. Schempp, supra at 221-222. "[I]ncidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions." Lyng v. Northwest Indian Cemetery Protective Ass'n, supra at 450-451. The "Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." Id. at 451, quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring). See Yonkers Racing Corp. v. Yonkers, 858 F.2d 855, 871 (2d Cir. 1988), cert. denied, 489 U.S. 1077 (1989).

Courts have found violations of the free exercise clause

where the State conditions receipt of an important benefit on conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by a religious belief. Smith v. Board of Educ., N. Babylon Union Free Sch. Dist., supra at 93. The Supreme Court has invalidated conditions on the receipt of unemployment benefits which indirectly burden free exercise without sufficient justification. See Hobbie v.

[slip op. 19]

Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

We conclude that the program in issue which does not violate the plaintiffs' parental liberties or privacy rights also does not violate their rights freely to exercise their religion. There is no requirement that any student participate in the program. The plaintiffs argument that the well-known existence of peer pressure in secondary schools adds to the alleged burden on their free exercise rights simply does not rise to the level of constitutional infringement. See Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal.App.3d 1, 17 (1975); Smith v. Ricci, 89 N.J. 514, 521, appeal dismissed sub nom. Smith v. Brandt, 459 U.S. 962 (1982). The condom-availability program in Falmouth does not penalize students or parents for their religious beliefs or condition the receipt of benefits on a certain belief. Although the program may offend the religious sensibilities of the plaintiffs, mere exposure at public schools to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their individual religious or moral preferences. Epperson v. Arkansas, 393 U.S. 97, 106 (1968). Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528 (9th Cir.1985).

**Judgment affirmed.**

[slip op. 1]

**COMMONWEALTH OF MASSACHUSETTS**

**Barnstable, ss.** **SUPERIOR COURT**
CIVIL ACTION
**No. 92-518**

ELIZABETH G. CURTIS, and others[1]
VS.
THE FALMOUTH SCHOOL COMMITTEE, and others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, junior high school students in the Falmouth School System and their parents, brought this action against defendants, the Falmouth School Committee (FSC), in response to FSC's implementation of a condom availability program in the schools. Plaintiffs' amended complaint alleges that the condom distribution infringes on family privacy and free exercise rights in violation of the First and Fourteenth Amendments of the United States Constitutions, 42 U.S.C. § 1983 and G.L. c.12 §11I. Plaintiffs also seek declaratory

---

1. By next friend, Carol Curtis and Carol Curtis, Daniel MacLone, by next friend, Nacy MacLone and Nancy Malone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer and Matthew Peltzer, by their next friend Beverly Peltzer, and Beverly Peltzer, and Edward Peltzer

2. Suzanne McGee, in her official capacity as superintendent, Howard Campbell, individually and in his official capacity, Donald Friedman, in his official capacity

judgments establishing that defendants' conduct violated G.L. c.274, §3 and G.L. c. 265, §23, by functioning as accomplices to statutory rape on or by the students, G.L. c.119, §51A, by failing to report sexual abuse of

[slip op. 2]

students reasonably expected to occur based on students' use of condoms, and G.L. c.71 § 30, the moral education statute. Finally, plaintiffs also seek a preliminary injunction to prevent defendants from continuing to make condoms available to students.

This matter is now before the court on defendants' motion for summary judgment. FSC argues that because the plaintiffs have failed to make a threshold showing of a constitutional violation, summary judgment should enter in their favor. Defendants further argue that plaintiffs have neither standing nor a cause of action for the declaratory relief sought, and that plaintiffs have not met their burden for injunctive relief. For the reasons stated below, defendants' motion for summary judgment is allowed, and plaintiffs' motion for preliminary injunction is denied

## BACKGROUND

The undisputed material facts are taken from the pleadings and affidavits submitted by the parties.

On January 2, 1992, following an authorizing vote of the FSC, the Superintendent of Schools issued a memorandum to the teaching staff of grades 7 through 12, detailing the condom availability program. At Lawrence Junior High School, students could request free condoms from the school nurse. Prior to receiving them, students would be counseled[3]. The

nurse was also

[slip op. 3]

instructed to give students pamphlets on AIDS/HIV and other sexually transmitted diseases. At Falmouth High School, students could request free condoms from the school nurse, or students could purchase them for $.75 from the condom vending machines located in the lower level boys' and girls' restrooms. Counseling by trained faculty members would be provided to students who requested it, and informational pamphlets were available in the nurse's office. The Superintendent's memorandum instructed the staff to reserve their own opinions regarding condom availability in order to respect students' privacy. The memorandum also indicates that the Superintendent's presentation of the condom availability to the student body would stress abstinence as the only certain method for avoiding sexually transmitted diseases. The condom availability program took effect on January 2, 1992.

The FSC condom program does not provide for an "opt out" for students' parents whereby the parents have the option of excluding their student child from the availability of condoms. Nor is there a parental notification provision in the FSC program by which parents would be notified of their children's request for condoms.

Because no high school currently exists in the town of Mashpee, Mashpee residents attend Falmouth High School pursuant to a five-year contract between the Mashpee and

---

3. Plaintiffs' complaint alleges that on one occasion, a Lawrence Junior High student who requested a condom on a Friday afternoon and was supplied with one after being asked only, "do you know how to put one on?" and then told to return for counseling the following week.

Falmouth School committees. The contract does not provide for Mashpee residents to vote in the elections of FSC members. The contract does not prohibit the Mashpee School Committee (MSC) from entering into a similar contract with other neighboring schools or school

[slip op. 4]

committees. On September 20, 1992, the MSC voted 4-1 to object to the FSC condom availability program. Pursuant to the contract between the FSC and the MSC, this vote was not binding on the FSC.

## DISCUSSION

### I. Summary judgment and preliminary injunction

Because a request for injunctive relief requires an evaluation of the moving party's likelihood of success on the merits as well as the nature of the injury claimed, Packaging Industries Group, Inc. v. Cheney, 380 Mass. 609, 616-17 (1980), the court will first consider the defendants' motion for summary judgment on the merits.

Summary judgment shall be granted where there are no genuine issues as to any material fact in dispute and where the moving party is entitled to judgment as a matter of law. Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, "and [further,] that the moving party is entitled to judgment as a matter of law." Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative

evidence that negates an essential element of the opponent's case or "by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 850, 809 (1991); accord, Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716

[slip op. 5]

(1991).

The material facts in the present matter are undisputed[4]. Plaintiffs allege that the FSC program is unconstitutional. Their position is that the FSC condom distribution program conveys a message of encouragement to the students to engage in sexual promiscuity. Specifically, plaintiffs argue that the program interferes with their constitutionally protected right to nurture and direct the moral upbringing of their children. At the same time, plaintiffs argue that the FSC program violates their right to freely exercise their religion by instilling in their children sincerely held beliefs regarding chastity, morality and the sin of sex outside of marriage.[5] To be sure, plaintiffs share defendants' concern over the spread of AIDS/HIV amongst the students. Nevertheless, plaintiffs' position is that the state of Massachusetts, acting through the FSC, must not be allowed to invade the constitutionally protected privacy of the home, nor interfere with the constitutional guarantee of freedom of

---

4. Plaintiffs have submitted numerous affidavits, articles and studies which dispute the effectiveness of latex condoms in prevention of the spread of AIDS/HIV. Whether such data is controverted or not, it is not material for the purpose of deciding summary judgment, nor germane to the constitutional issue presented. See Zorach v. Clausen, 343 U.S. 306, 310, 72 S.Ct. 679, 682 (1952).

5. The sincerity of plaintiffs' beliefs is not an issue.

exercise.

Defendants deny that the FSC condom availability program invades these constitutionally protected areas. Moreover, defendants argue that because plaintiffs have not established that the FSC condom policy violates plaintiffs' constitutional

[slip op. 6]

rights, that this case should be dismissed as a matter of law. Defendants ask the court to refrain from substituting its judgment for that of the FSC, whose condom policy was arrived at through proper political and legislative processes.[6]

A. Predicate finding of constitutional violation

This case involves the competing interests of parents and the state in the education and upbringing of children. The law is well settled that public education of children is committed to the control, management and discretion of state and local school committees. Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166-167, 64 S. Ct. 438, 442 (1944); Epperson v. Arkansas, 393 U.S. 97, 104, 89 S. Ct. 266, 270 (1968); Wulff v. Wakefield, 221 Mass. 427, 429 (1915). The law is also established that the constitution protects "zones of privacy", Roe v. Wade, 410 U.S. 113, 152, 93 S. Ct. 705, 726 (1973), Carey v. Population Services International, 431 U.S. 594, 684, 97 S. Ct. 2010, 2016 (1977), including family relationships, Prince, 321 U.S. at 166, and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S.Ct. 571, 573 (1925); Meyer v. Nebraska, 262 U.S. 390, 399,

---

6. Plaintiffs have not attacked the legitimacy or adequacy of this political process.

43 S.Ct. 625 (1923).[7]

"A State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interest, such as those

[slip op. 7]

specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children . . ." Wisconsin v. Yoder, 406 U.S. 212, 214, 92 S. Ct. 1526, 1532 (1972). However, judicial balancing of the state's interests against the parents' interests occurs only if a constitutional violation of the state has first been established. Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 109 S. Ct. 2136, 2149 (1989) (free exercise inquiry asks first whether government has substantially burdened central religious belief, if so, whether compelling government interest justifies it); Lyng v. Northwest Indian Cemetary Protective Assoc., 485 U.S. 439, 447-452, 108 S. Ct. 1319, 1324-1326 (1988) (road construction through Native American sacred grounds not violative of the First Amendment; balancing of burden on free exercise against state's compelling interest predicated on finding of constitutional violation); Yoder, 406 U.S. at 214, 92 S. Ct. at 1532 (state compulsory school attendance law found to impinge on Amish free exercise); Doe v. Irwin, 615 F. 2d 1162, 1169 (6th Cir. 1980) (where no unconstitutional interference with parents rights was found, there was no need to engage in balancing of state's and parents' interests). See also, Ware v. Valley Stream High School District, 550 N.E.2d 420, 426 (Ct.

---

7. Among these privacy interests is a minor's right to make decisions affecting procreation, including a right to access contraception. Carey v. Populations Services International, 431 U.S. 678, 693-694, 97 S. Ct. 2010, 2020-2021 (1977).

App. of NY 1989) (free exercise inquiry follows two step analysis). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson v. Arkansas, 393 U.S. 103, 104, 89 S. Ct. 266, 270 (1968). Thus, in order for plaintiffs in this

[slip op. 8]

matter to survive summary judgment, this court must find that the FSC condom policy rises to the level of a constitutional infringement.

B. Coercion required for constitutional violation

Because issues of free exercise and privacy are so intertwined in this case, and because "the outer limits of this aspect of privacy have not been marked" Carey, 431 U.S. at 684, 97 S. Ct. at 2016, the court will address both rights using the First Amendment free exercise inquiry[8]. See Grove v. Mead School, 753 F.2d 1528, 1531 (9th Cir.), cert. den., 474 U.S. 826, 106 S. Ct. 826 (1985) (one aspect of religious freedom of parents is the right to control the religious upbringing and training of their minor children).

The First Amendment provides that the government "shall make no law respecting an establishment of religion, or

---

8. Alternatively, even if the free exercise and privacy inquires were conducted separately, they would both focus on coercion as the test for a constitutional violation. See Doe v. Irwin, 615 F.2d 1162, 1167 (6th Cir. 1980) (noting that the leading U.S. Supreme Court cases analyzing violations of parents' constitutional right to care and nurture their children focus on whether the state is either requiringor prohibiting some activity).

prohibiting the free exercise thereof . . ." U.S. Const., amend. I. "The distinction between the two clauses is apparent -- a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause need not be so attended." School District of Abington v. Schemp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572 (1963) (emphasis added). "To establish a violation of that [free exercise] clause, a litigant must show that the challenged state action has a coercive effect that operates against the litigant's

[slip op. 9]

practice of his or her religion." Id, 374 U.S. at 222, 83 S. Ct. at 1572. The government cannot prohibit the free exercise of religion, either directly or through indirect coercion or penalties on free exercise. Lyng 485 U.S. at 449, 108 S. Ct. at 1326.

"This does not and cannot imply that incidental effects of government programs, which may make it more difficult to practice but have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." Id. Mere exposure to ideas which contradict religious beliefs does not impermissibly burden the free exercise of religion; the First Amendment does not guarantee that a school curriculum will offend no religious beliefs. See Ware v. Valley Stream High School, 550 N.E.2d 420, 427 (Ct. App. NY 1989). See also Grove v. Mead School District, 753 F.2d 1528, 1543 (9th Cir.), cert. den., 474 U.S. 826 (1985) (mere offense at having textbook in school curriculum, where reading not compelled, did not violate First Amendment); Wilson v. Block, 708 F.2d 735, 741 (D.C. Cir. 1983) (government actions that merely offend or cast doubt on religious beliefs do not violate Free Exercise Clause). Moreover, "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions or any religious sect

or dogma." Epperson, 393 U.S. at 106, 89 S. Ct. at 271.

[slip op. 10]

C. FSC program not coercive

Plaintiffs in the present matter argue that the FSC program is coercive in two ways[9]. On one hand, plaintiffs assert that the program is coercive because under the compulsory attendance law of Massachusetts, G.L. c. 76, §1, plaintiffs are required to send their children to school, thus the students' acceptance of the FSC condom program is compelled, in contradiction of plaintiffs family values and religious beliefs. Plaintiffs rely heavily on Wisconsin v. Yoder, 406 U.S. 212, 92 S. Ct. 1526 (1972), in which the United States Supreme Court held that the compulsory education statute of that state violated the Amish plaintiffs' rights under the Free Exercise Clause of the First Amendment.

The situation in the Yoder case is clearly distinguishable from the present matter. To begin with, the compulsory education statute of Wisconsin was truly coercive, in the sense that parents who failed to comply with it faced criminal charges and convictions. The Court, after making exhaustive findings regarding the religious beliefs and practices unique to the Amish community held that, "[t]he impact of the compulsory-attendance law on respondents' practice of the Amish religion is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." Yoder, 406 U.S. at 218, 92 S. Ct. at 1534. The Yoder Court went on to limit the reach of its finding, stating that the

---

9. Plaintiffs also argue that coercion is not necessary to a claim of a violation of free exercise or privacy.

[slip op. 11]

factual record establishing the coercive effect of the Wisconsin statute on the Amish was "one that probably few other religious groups or sects could make. . . " Yoder, 406 U.S. at 235-236, 92 S. Ct. at 1543. See also Lyng, 485 U.S. at 457, 108 S. Ct. 1329; Doe, 615 F.2d at 1168 (both cases distinguishing Yoder based on the coercive nature of its compulsory education statute). Thus, reliance on the Yoder case is misplaced, because plaintiffs have not shown that the FSC condom policy inescapably compels them to perform acts undeniably at odds with their religious and moral beliefs.

Plaintiffs also contend that the FSC condom program is coercive or compulsory, because it fails to provide parents with an "opt out" mechanism allowing them to withhold their children's participation in the program. The fact that there is no "opt out" provision, in and of itself, cannot be said to give the FSC condom program a coercive character. If the FSC condom availability program is not coercive, there is no need for an "opt out" provision.

The FSC condom program is one of "condom availability" and not one of "condom distribution." As described by the undisputed facts above, the FSC program is not coercive. FSC is not in any way forcing students to participate in the program, and neither students nor their parents are being penalized or sanctioned if they choose not to participate. See Alfonso v. Fernandez, 584 N.Y.S.2d 406, 410 (1992) (public high school's condom availability program, which did not include an "opt out" provision for parents, held not violative of constitutional parental privacy or free exercise rights). "A State benefit is

[slip op. 12]

not being conditioned upon conduct prohibited by one's faith, nor is a benefit denied due to conduct mandated by one's faith."

Id. Simply put, the condoms are there for the asking.

Moreover, there is "no prohibition against plaintiffs' participating in decisions of their minor children on issues of sexual activity and birth control. The plaintiffs remain free to exercise their traditional care, custody and control over their unemancipated children." Doe, 615 F.2d 1162, 1169 (6th Cir. 1980) (no deprivation of parental privacy right found where program making contraceptives available to minors did not provide for parental notification).[10] Competition for students' attention and allegiance, incidental burdens on religious beliefs, and exposure to ideas inconsistent with personal and moral values do not per se rise to the level of constitutional infringements.

In conclusion, this court finds that the FSC condom availability program is not coercive of plaintiffs' constitutionally protected rights of privacy and free exercise and, therefore, plaintiffs have failed to make a threshold showing of a constitutional violation of the First and Fourteenth Amendments. The same analysis disposes of the plaintiffs' claim under 42 U.S.C. §1983 and G.L. c.12, §11I.

[slip op. 13]

The court must therefore refrain from determining whether a compelling state interest outweighs the parents constitutional interests. "The Constitution does not, and courts cannot, offer to reconcile the various competing demands on government,

---

10. In fact, because minors have constitutional rights toaccess contraceptives, an "opt out" provision may itself be constitutionally problematic. See Carey, 431 U.S. at 692, 97 S. Ct. at 2020 ("the State does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto [citation omitted] which the state itself is absolutely and totally prohibited from exercising").

many of them rooted in sincere religious beliefs, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." Lyng, 485 U.S. at 453, 108 S. Ct. at 1327. As a matter of law, summary judgment must be granted. Furthermore, because plaintiffs have not demonstrated a likelihood of success on the merits, their request for a preliminary injunction is denied.

II. Declaratory relief under statutory claims

A declaratory judgment under G.L. c.231A requires an actual controversy which is specifically set forth in the pleadings. A court action cannot concern hypothetical controversies. The purpose of the "actual controversy" requirement is to ensure that litigants file complaints for declaratory judgment to obtain relief only from "uncertainty and insecurity with respect to rights, duties, status and other legal relations." Mass. Assoc. of Ind. Agents and Brokers Inc. v. Commr. of Ins., 373 Mass. 290, 292 (1977). A real dispute is raised by a litigant with a definite interest, which unless addressed will almost immediately and inevitably lead to litigation. Bunker Hill Distributing Inc. v. District Attorney for the Suffolk District, 376 Mass. 142, 144 (1978). Abstract assertions will not support a claim for declaratory judgment. Quincy City Hospital v. Rate Setting Commission, 406 Mass. 431, 439 (1990).

Plaintiffs have not demonstrated that an actual dispute

[slip op. 14]

exists under G.L. c.274, §3 and G.L. c.265, §23, accessory to statutory rape. More importantly, plaintiffs have no cause of action or standing to seek a declaration as to how the Commonwealth should proceed in enforcing the state's criminal statutes. "[I]n American jurisprudence . . . a private citizen

lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Whitley v. Commonwealth, 369 Mass. 961, 962 (1975) (citing Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973). Nor may a court properly direct or compel the executive to prosecute a law, in light of the principle of separation of powers of Part I, Art. 30 of the Massachusetts Constitution. Burlington v. District Attorney for the Northern District, 381 Mass. 717, 721 (1980).

For virtually the same reasons, declaratory judgment is not proper under G.L. c.119, §51a. Plaintiffs' claim under this reporting statute is dependent on a declaration that the FSC was and continues to be an accessory to statutory rape. For the reasons stated above, plaintiffs have no standing for declaratory judgment. Moreover, a decree that defendants must report their own criminal activity against their own penal interests would seriously implicate defendants' constitutional rights against self-incrimination.

Finally, plaintiffs also lack standing under the moral education statute, G.L. c.71, §30, which vests a cause of action in employers of educators, allowing them to restrict certain communications while at work, communications otherwise protected by the free speech guarantee of the First Amendment. See Coyne v. City of Somerville, 770 F. Supp. 740, 751-753 (D. Mass. 1991).

[slip op. 15]

ORDER

For the foregoing reasons, it is hereby ORDERED that:

1) Defendants' motion for summary judgment is ALLOWED;
2) Plaintiffs' motion for preliminary injunction is DENIED;
3) Plaintiffs' claim for declaratory relief is DISMISSED

/s/ Gerald F. O'Neill, Jr.
Gerald F. O'Neill, Jr.
Justice of the Superior Court

Dated: October 7, 1993
[attestation omitted]

**COMMONWEALTH OF MASSACHUSETTS**

**Barnstable, ss.** **SUPERIOR COURT**

**No. 92-518**

ELIZABETH G. CURTIS et al.

VS.

THE FALMOUTH SCHOOL COMMITTEE et al

**JUDGMENT (SUMMARY)**

(Pursuant to Mass. R. Civ. P. 56)

This action came on to be heard before the Court, O'Neill, J., presiding, upon motion of the defendants, Falmouth School Committee, Suzanne McGee, Superintendent, Donald Friedman, Individually and as Principal, and Howard Campbell, Individually and as Principal, for summary judgment pursuant to Mass. R. Civ. P. 56, the parties having been heard and the Court having considered the pleadings and affidavits, finds there is no genuine issue as to material fact and that the defendants, are entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

that the complaint of plaintiffs, Elizabeth G. Curtis ppa, Carol Curtis, Kristen Jenkinson ppa, Eileen F. McDevitt, Daniel MacLone ppa, Nancy MacLone, Eugene Bardeen, Alice Bardeen, Bryan Peltzer ppa, Beverly Peltzer and Edward Peltzer, be and hereby is dismissed against defendants, Falmouth School Committee, Suzanne McGee, Superintendent, Donald Friedman, Individually and as Principal, and Howard Campbell, Individually and as Principal, without costs.

Dated at Barnstable, Massachusetts, this eighth day of October, 1993.

FORM OF JUDGMENT APPROVED:

/s/ Gerald F. O'Neill, Jr.
Justice of the Superior Court

/s/ Phyllis A. Day
Clerk